Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 725

GEORGE STEVENSON, a minor by his next friend, Mrs. Mattie Stevenson; LARRY D. HARVEY, a minor, by his next friend, J. W. Harvey, Jr.; AVERY W. HARVEY, JR., by his next friend, A. W. Harvey on behalf of themselves and all others similarly situated,

Petitioners,

versus

THE BOARD OF EDUCATION OF WHEELER COUNTY, GEORGIA, and ASHLEY CLARKE, W. J. MITCHELL, L. B. CHAMBERS, A. B. CLARK, CLADY COX, V. L. NEWTON individually and in their official capacities as members of the Board of Education of Wheeler County, Georgia; WILLIAM S. CLARK, individually and in his official capacity as Superintendent of Schools of Wheeler County; PERRY DOAK, individually and in his official capacity as Principal of Wheeler County High School,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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For the reasons herein stated the cause of these Petitioners should not be reviewed by this Court.

QUESTIONS PRESENTED

Contrary to the contentions of Petitioners this cause presents only the questions (a) of whether or not the District Court in its findings of fact and conclusions of law erred in concluding that Respondent school board in good faith adopted and fairly enforced reasonable regulations requiring good grooming of its students and (b) of whether or not the United States Court of Appeals for the Fifth Circuit erred in affirming the judgment of the District Court.

STATEMENT OF THE CASE

A. *Petitioner Avery Harvey Has Complied With the Challenged Regulation and Returned to School.*

On September 30, 1970, Petitioner Avery Harvey complied with the regulations herein challenged and was readmitted to the Wheeler County High School. Appendix A. As to that Petitioner the issues urged are moot.

B. *The Case Below.*

The facts as found by the District Court and set forth in the opinion below, 306 F. Supp. 97 are:

> "In preparation for the approaching term the Board of Education adopted on August 5, 1969,

certain 'Policies Governing Students.' These included:

> 'Good personal grooming as well as behavior lends much to a good learning environment. All students will be expected to meet the standards of good grooming as set by the faculty and administration and interpreted by the principal or assistant principal of the school. These shall include items such as hair cuts, shorts, cullots, length of dresses, shirt tails, etc. These standards in detail will be presented to each student as a supplement to this handbook and will be discussed at length by your homeroom teacher.'

"At a pre-school planning session the policies were discussed by the members of the faculty. They were implemented in certain respects by spelling out 'Neat Haircuts,' proper length of dresses, etc. At some point, it is not exactly clear when, the faculty adopted a 'clean-shaven' rule for male students. None of these faculty regulations were printed or posted; they are still only in the form of notes. However, they were announced to all the students at a school assembly. This included the 'clean-shaven' regulation. The policies were also announced by the teachers to the students in the various classrooms.

"The 'good grooming' policies have been uniformly enforced and there has been no racial discrimination. Four white students have been warned by teachers to cut their hair or shave, otherwise not to come back to school. In each case they complied. Nine colored youths have been similarly warned. All of them complied. Three others (the plaintiffs) refused to do so. They were respectively suspended on October 17th, 20th and 23rd. They are still out of school.

"Each of the plaintiffs belongs to the Negro race. George Stevenson who is 16 testified that he objected to shaving until he is old enough. He says that he is not ready to put a razor to his face and stated that he, not the School Board, is the one to decide when he should do so. Like the other two plaintiffs, he testified that he has never shaved. Stevenson has a small but perceptible mustache. His mother testified that he would shave when he gets old enough and knows of no law requiring him to do so. Larry D. Harvey who is 15 years old but is large for his age proposes to grow a mustache. In fact, he has. He also has a fair growth of fuzz on his chin and his jaws. Avery W. Harvey, Jr., who is 17 objects to shaving and desires to grow a mustache. He already has.

"The complaint charges that the expulsion of the plaintiffs has deprived them of rights

protected by the Fourteenth Amendment. While petitioners do not allege a First Amendment right to wear a mustache and to attend school unshaven, they assert that the constitutionally protected right to express one's individuality is involved. Ethnic factors are also claimed. The suit alleges that as a result of slavery the ancestors of petitioners were dehumanized and their manhood emasculated. They claim that the wearing of mustaches and facial hair growths are symbols for them and other black youths of their masculinity.

"There were no racial overtones in the adoption of the 'clean-shaven' policy. Among the witnesses for the Board was a colored high school teacher who strongly stressed the importance of good grooming in the educational process. She testified that shaving comes under it. All members of the faculty approved the rule that young men should be clean-shaven. School officials testified that any unusual diversion from the norm has a diverting influence on the student body. The basis of the rule in controversy is that mustaches and facial hair growth are distractive." pp. 98 & 99.

Since Petitioners do not contend that the District Court's findings of fact are not supported by the evidence or are clearly erroneous, the evidence is not herein summarized. Respondents, however, do call the Court's attention to the fact that Petitioners' original complaint, paragraphs V, IX and X, and their petition

for a writ of certiorari, particularly page 6, contend that Petitioners' refusal to shave and thereby comply with Respondents' good grooming regulations was and is founded upon their desire to grow a beard and thereby symbolically express their Negro manhood. Petitioners in testifying before the District Court, did not say anything other than that they and not the school board or faculty, should decide when they are to begin to shave and when a shave is needed. (Transcript pp. 84, 91, 95, 106, 109, 113, 116, 118-125). One Petitioner stated I "ought to be able to decide when to shave instead of the school board deciding..." (Tr. p. 109) Neither of minor Petitioners nor their parents objected to the policy or regulation of Respondents that requires a clean shave. None of Petitioners even mentioned racial discrimination or objected to the principle of shaving.

Petitioner George Stevenson's mother testified that she objected to George shaving and said that when George gets old enough, he will shave. (Tr. p. 95) On cross-examination she admitted that George's brother was also sent home from school to shave and that he shaved and returned to school. (Tr. p. 98)

Petitioner A. W. Harvey stated that in his opinion his son does not need to shave at this point and that "if he needed shaving, he would have shaved before he went to school." (Tr. p. 84)

Larry D. Harvey's father said "he don't have anything to shave . . .; it's too early for Larry to shave. (Tr. p. 113, 116)

The trial court found "the regulation under attack reasonable and not arbitrary. It was adopted in good faith and is not racially oriented.

"It is unfortunate that these three young men are not back in school but even more regrettable that they are voluntarily depriving themselves of an education. It is their doing, not mine. All they have to do to get back in school is to shave their upper lips. At the hearing I even suggested that if they did not want to use a razor they could use clippers. This was unsatisfactory to the petitioners who apparently place their right to go to shcool with hair above their lips and on their faces above getting an education. 306 F. Supp. 101. Because of this Petitioners' prayers for injunctive relief were denied.

On appeal the trial court's denial of Petitioners' prayers for injunction was affirmed. This court's attention is directed to the following portions of the opinion of the Court of Appeals for the Fifth Circuit:

> "At the outset, it is important to state that this case does not involve the right to wear a mustache; it is limited by its facts to three young men who, having entered puberty, have determined that they are not yet ready to shave or to otherwise remove the hair growth which has accumulated about their faces. In each instance, their parents were of the view that they did not need to shave. Neither the students nor the parents opposed the practice of shaving once the students have reached the

point where they need to shave. The school officials say that point has been reached. The students and parents say it has not. The good grooming rule, as to hair style and shaving, had been applied to several other students, Negro and white, who promptly complied and remained in school."

* * * *

"We repeat what the court said in Griffin v. Tatum, supra:

'This court held in Ferrell v. Dallas Independent School District, 5 Cir., 1968, 392 F.2d 697, that it was proper for school authorities to establish rules and regulations in the interest of school management and this included a hairstyle regulation. We have not denied school authorities in this circuit the right to promulgate reasonable regulations concerning hairstyles.' "

* * * *

" 'That such regulations may be necessary and, if so, that they may be promulgated and enforced, is also clear from the tenor of Tinker v. Des Moines Community School District, 1969, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731.'

"The evidence here supported the finding that shaving is a part of good grooming, in the opinion of the faculty, and that a failure to shave is a departure from the norm which has a diverting influence on the student body. The evidence also demonstrated that the three students had a general growth of hair about their faces to the extent that it was not unreasonable for the school officials to say that the time had come for them to shave. There was no evidence of racial discrimination nor any denial of equal protection as amongst the male students. There is no claim that the students did not know of the rule or that they did not understand it. These findings and conclusions of fact establish that the rule in question is founded on a rational basis, and that it was not arbitrarily applied. *It follows that no substantial federal constitutional question was presented.* There the matter ends." 426 F.2d 1156-8. Emphasis added.

ARGUMENT

A. *This Case Is Like Jackson v. Dorrier, No. 355, Certiorari Denied October 12, 1970.*

Jackson v. Dorrier, No. 355, cert. denied October 12, 1970, 39 U.S.L. Week 3149, ____ U.S. ____, as demonstrated by the following portions of the opinion below, 424 F.2d 213 (6th Cir. 1970), is similar and in reality on all fours with this cause:

"The Metropolitan Board of Education of Nashville and Davidson, County, Tennessee, adopted the following regulation in 1961:

> 'Pupils shall observe modesty, appropriateness, and neatness in clothing and personal appearance. A student is not appropriately dressed if he is a disturbing influence in class or school because of his mode of dress. The principal may suspend a student who does not meet this requirement.'

"Under this regulation the students at Donelson High School were told, as to hair on male students, that hair in the front may not come below the eyebrows, ears must show clear of hair, and hair in the back is to be tapered and not be long enough to turn up.

"Two male students, Michael Jackson and Barry Steven Barnes, who were members of a combo band known as 'The Purple Haze,' permitted their hair to grow longer than prescribed by school officials. After conferences with the students and their parents the students were suspended by the principal and sent home for violation of the regulation. After additional conferences a hearing was conducted before the Board of Education. The Board sustained the action of the principal." pp. 214, 215

* * * *

"District Judge Frank Gray, Jr., conducted an extensive hearing and denied injunctive relief. He made an affirmative finding of fact to the effect that the evidence unquestionably establishes that the regulation has a real and reasonable connection with the successful operation of the educational system, in that it is reasonably calculated to maintain school discipline. He held that the evidence failed to show that the students have been deprived of any constitutional rights.

"We affirm." p. 215

* * * *

"The District Court made a finding of fact to the effect that the regulation here attacked, as interpreted and enforced by the principal of Donelson High School, has a real and reasonable connection with the successful operation of the educational system and tends to help maintain school discipline. He further found that the evidence failed to show that the students have been deprived of any constitutional rights." p. 216

* * * *

"It is contended that enforcement of the regulation deprived the two students of freedom of speech and expression in violation of the First Amendment. Neither of the students tes-

tified that his hair style was intended as an expression of any idea or point of view." p. 217

* * * *

"As previously stated, substantial evidence supports the finding of the District Judge that the regulation has a real and reasonable connection with the successful operation of the educational system and with the maintenance of school discipline." p. 218

* * * *

"In the absence of infringement of constitutional rights, the responsibility for maintaining proper standards of decorum and discipline and a wholesome academic environment at Donelson High School is not vested in the federal courts, but in the principal and faculty of the school and the Metropolitan Board of Education of Nashville and Davidson County, Tennessee." pp. 218, 219

For the same reasons that certiorari was denied in *Jackson v. Dorrier*, it should be denied in this cause.

B. *This Decision Does Not Conflict With The Decision of Another Court of Appeals*

Petitioners while they "acknowledge no case exactly on point with this one", assert that this decision conflicts with *Breen v. Kahl*, 419 F2d 1034 (7th Cir. 1969),

cert. denied, ____ U.S. ____ 38 U.S.L. Week 3478: pages 8 & 9 of Petition.

The District Court in *Breen v. Kahl*, 296 F.Supp. 702, in considering whether or not "wearing one's hair at a certain length or wearing a beard is a form of constitutionally protected expression..." stated that "In the view I take of this matter, however, *it is unnecessary to reach a conclusion* whether wearing one's hair at a certain length or wearing a beard falls within that category of 'expression' protected by the First Amendment." p. 705, emphasis added. The District Court went on to determine instead "whether the defendants have met the 'substantial burden of justification' of this regulation which invades a freedom deserving a high degree of protection ..." p. 708. The court found:

> "In many situations, no doubt, whether 'a substantial burden of justification' of a regulation has been met is a delicate and uncertain matter. This is not such a situation. Defendants here have fallen far short of showing that the distraction caused by male high school students whose hair exceeds the Board standard is so aggravated, so frequent, so general, and so persistent that this invasion of their individual freedom by the state is warranted. The same is true of defendants' showing with respect to the differential in school performance between male students with long hair and those with short hair." p. 709.

In effect the court determined that the Defendants failed to carry the burden of proof that was upon them.

The Seventh Circuit Court of Appeals affirmed and in so doing distinguished *Breen* from *Ferrell v. Dallas Independent School District*, the Court of Appeals decision which Petitioners contend *Breen* conflicts with, to wit:

> "The failure of appellants to sustain any burden of substantial justification distinguishes the case at bar from the situation in Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968), cert. denied, 393 U.S. 856, 89 S.Ct. 98, 21 L.Ed.2d 125 (1968), upon which the appellant School Board heavily relies. In *Ferrell*, the court in upholding the constitutionality of the school regulation found that wearing of long hair by students created disturbances and problems during school hours. Although we are more inclined to agree with Judge Tuttle's dissenting opinion in *Ferrell* that 'court's [are] too prone to permit a curtailment of a constitutional right of a dissenter, because of the likelihood that it will bring disorder[s], resistance or improper and even violent action by those supporting the status quo,' in the case at bar there is no evidence of any disturbance created by the long hair of the students. Consequently, we are not faced with the problem of evaluating whether regardless of some disorder constitutional rights must still be protected, see Terminiello v. City of

Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1948)." p. 1037.

Respondents respectfully submit that the circuit courts have consistently required school boards to carry a substantial burden of justifying rules and regulations like those here under attack and that as such there is agreement — not conflict — as to the basic legal issue involved. *Breen v. Kahl, supra, Ferrell v. Dallas Independent School District, supra, Jackson v. Dorrier, supra,* and this case are examples of this consistency. Since Petitioners do not contend that any other particular circuit court decision conflicts, Respondents have not included a summary or discussion of the other cases that could also be mentioned but if the Court desires, will be pleased to summarize or discuss any other cases.

There is no conflict among the courts of appeal, and for this additional reason certiorari should be denied.

C. *There Are No Other Grounds Or Reasons For The Granting Of This Petition*

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor . . ." Rule 19.

Respondents have already demonstrated that this Court of Appeals decision is in harmony — not conflict — with those of other courts of appeals. Petitioners do not contend that any of the other reasons

enumerated in Rule 19(b) are a reason for this cause to be reviewed. They do contend in effect that Respondents did not carry the burden of justification i.e. "respondents have not shown any reasons for the restrictions placed upon petitioners right ..." page 9 of Petition; "It is beyond us the purpose of such a regulation. Merely arbitrary choices of states or their official representatives cannot be enforced against any individual's serious claims of liberty ..." *id.* p. 13. "The decision below is palpably erroneous." *id.* p. 15.

"...Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses ..." Rule 52, Federal Rules of Civil Procedure.

Chief District Judge Lawrence judged of the credibility of the witnesses, heard the evidence and determined that the regulation in question was reasonable, was adopted in good faith and "is not racially oriented." 306 F. Supp. 101. There is more than sufficient evidence to support these findings of the District Court, and as such there is no merit in the "palpably erroneous" argument urged by Petitioners.

CONCLUSION

There are no special or important reasons for the granting of review on writ of certiorari of this cause. As a matter of sound judicial discretion review of this case should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a copy of the within response was this date mailed to Messrs. C. B. King & Elliott Holden, to Thomas M. Jackson and to Howard Moore, Jr. by depositing the same in a United States post office or mail box with first class prepaid postage thereon in an envelope addressed to each of them at their respective post office addresses.

This _____ day of November, 1970.

Wilbur D. Owens, Jr.

APPENDIX A

WHEELER COUNTY BOARD OF EDUCATION
Wm. S. Clark, Superintendent
Carline B. Cox, Clerk
Alamo Georgia
30411
Office Phone 568-3041
Resident Phone-568-2451

September 30, 1970

Wilbur D. Owens, Jr.
Attorney
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Dear Mr. Owens:

This is to notify you that Avery Harvey, one of the Plaintiffs in the George Stevenson et al vs. the Wheeler County Board of Education No. 731 in the U.S. District Court, Southern District of Georgia, Dublin Division, has as of this date returned to the Wheeler County High School, fully conformed to all school policies.

Sincerely,

(Signed) WM. S. CLARK
Wm. S. Clark, Supt.
Wheeler Co. Schools

WSC:cc